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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

FAIR HOUSING COUNCIL OF SAN FERNANDO VALLEY; FAIR HOUSING COUNCIL OF SAN DIEGO; each individually and on behalf of the general public,

Plaintiffs,

vs.

ROOMMATE.COM, LLC,

Defendant.

CASE NO. CV03-9386 PA (RZx)

DEFENDANT'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

[Filed concurrently with Declarations of Bryan Peters and Timothy L. Alger, Defendant's Statement of Uncontroverted Facts and Conclusions of Law, and [Proposed] Judgment.]

Date: October 20, 2008
Time: 1:30 p.m.
Place: Courtroom 15

Honorable Percy Anderson

Complaint filed: December 22, 2003
Pre-trial Conf.: October 15, 2004
Trial Date: December 16, 2008

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 20, 2008, in Courtroom 15 of the above-entitled court, located at 312 North Spring Street, Los Angeles, California 90012, before the Honorable Percy Anderson, defendant Roommate.com, LLC will, and hereby does, move the Court for summary judgment on plaintiffs' first claim for relief, for violation of the Federal Fair Housing Act, and for dismissal of plaintiffs' second, third, fourth and fifth claims for relief, for violation of the California Fair Employment and Housing Act, the Unruh Civil Rights Act, Business and Professions Code § 17200, and for negligence, which are grounded entirely in state law.

This Motion is made on the ground that there are no genuine issues of material fact and defendant is entitled to judgment as a matter of law, for the following reasons:

1. To the extent that plaintiffs' claims for relief are based on statements made by third parties in the "Additional Comments" section of their profiles, or on any use of the roommates.com website other than for its intended purpose of finding a roommate for shared living, defendant is immune from liability under the Communications Decency Act of 1996, 47 U.S.C. § 230 ("CDA").

2. Plaintiffs lack standing to challenge the formatted questions and answers under the Fair Housing Act, 42 U.S.C. § 3604 ("FHA"), because they have not established the proof of actual injury or diversion of resources necessary to afford them standing at the summary judgment stage.

3. The FHA does not apply to postings seeking roommates for shared living, and plaintiffs' claims under the FHA therefore fail as a matter of law. Further, any interpretation of the FHA to prohibit advertising for shared living based on sex, sexual orientation, or the presence of children would violate fundamental constitutional protections of speech and intimate association. Statutes should be construed to avoid such

questions where, as here, an alternative interpretation is not only available, but better reflects the intent of Congress and the interpretation of the agency charged with enforcing the law.

4. If plaintiffs' claim under federal law is dismissed, as it should be, there is no reason for the Court to revisit its earlier decision declining to exercise supplemental jurisdiction over plaintiffs' remaining claims arising purely under state law.

This Motion is brought pursuant to Fed. R. Civ. P. 56 and is based on this Notice, the attached Memorandum of Points and Authorities, the concurrently filed Declarations of Bryan Peters and Timothy L. Alger and their exhibits, the concurrently filed Statement of Uncontroverted Facts and Conclusions of Law, those matters of which the Court takes judicial notice, the Court's file in this matter, and any other evidence and argument as may be presented at the hearing on the Motion.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on June 13, 2008.

DATED: September 15, 2008

QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP

By _____
Timothy L. Alger
Attorneys for Defendant
Roommate.com, LLC

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# MEMORANDUM OF POINTS AND AUTHORITIES

## I.

## INTRODUCTION

The question presented in this motion is a narrow one:[1] do solicitations for roommates for shared living which include answers to questions about sex, sexual orientation, and the presence of children in the household violate the Federal Fair Housing Act ("FHA")? The FHA's legislative history, case law and administrative interpretations of the governmental agency implementing the Act clearly confirm that they do not.

Before analyzing the solicitations at issue, it is important to bear in mind what is *not* in dispute. Under the Ninth Circuit's *en banc* decision, defendant is immune from liability for any statements made in the "Additional Comments" section of users' profiles. Thus, to the extent plaintiffs' claims implicate such comments, they are barred. Further, plaintiffs have produced no evidence that the website is designed for any purpose other than to provide a convenient means for roommates to find each other, and federal law immunizes defendant from liability for unintended uses.

The intended use of the website is simply not encompassed within the prohibitions of the FHA. Congress intended the FHA to apply to commercial rentals and sales, not to postings for compatible roommates, and no court has ever held otherwise. Moreover, any eleventh-hour attempt by plaintiffs to characterize the website as a commercial vehicle for landlords plainly fails. The disputed conduct clearly involves postings by private individuals for shared living arrangements. Plaintiffs' interpretation of the FHA is not only inconsistent with legislative intent,

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[1] This question is only reached, of course, if the Court concludes that the plaintiffs have met the preliminary requirements for standing, by presenting proof of actual injury or diversion of resources as a direct result of defendant's conduct. *See* Section III(B), *infra*.

prior regulations and precedent, but would violate the constitutional rights of defendant and its website users. Accordingly, under the fundamental canon of statutory construction that legislation should be construed to avoid constitutional questions, defendant's construction of the statute, which avoids such concerns, should be upheld, and the motion for summary judgment should be granted.

## II.

## BACKGROUND

Defendant Roommate.com, LLC ("Roommate" or "defendant") owns and operates roommates.com, a roommate matching service that is accessed through the Internet at http://www.roommates.com. (Separate Statement ("SS") ¶ 1.) Individuals who are looking to share a residence may post information about themselves and their roommate preferences (SS ¶ 2) and users can search the database based on criteria such as geographic location and roommate characteristics, including gender, sexual orientation, and family status, as well as any other criteria they choose. (SS ¶ 3.) Roommates.com receives over 40,000 visits and 700,000 page views per day. (SS ¶ 4.) In any given year, approximately 1 million new postings for roommates are created by users. (SS ¶ 4.) Among its 140,000 active listings, roughly one-third are posted by individuals who have a place available to share, and roughly two-thirds by those who are looking for a place to share. (SS ¶ 5.)

Basic membership, which is free of charge, allows a user to create a personal profile, conduct searches of the database, and send "roommail" (a form of e-mail within the website) to other users. (SS ¶ 6.) Users may upgrade their memberships by paying a fee, which then allows them to read profile "comments" and receive "roommail." (SS ¶ 6.) To create a personal profile, a user responds to a series of questions, including questions as to his or her own gender, sexual orientation, and whether children will be living with them (SS ¶ 7), and their preferences (if any) with respect to the gender and sexual orientation of a potential roommate, and whether they are willing to live with children. (SS ¶ 8.) These roommate preferences are

optional; the default settings as to each question reflect *no* preference, and the user must alter these settings to indicate any preference. (SS ¶ 9.) Users may also include additional information about themselves, and the residence they are offering to share or would like to find to share, as "Additional Comments." (SS ¶ 10.)

On September 30, 2004, this Court granted summary judgment in favor of defendant on the ground that plaintiffs' claim under the FHA was barred by the immunity provisions of the Communications Decency Act of 1996, 47 U.S.C. § 230(c) ("CDA"). The Court dismissed the federal claim without considering whether Roommate's actions actually violated the FHA and declined to exercise supplemental jurisdiction over the remaining state law claims.

The Ninth Circuit, *en banc*, affirmed in part and reversed in part. *Fair Housing Council v. Roommates.com*, 521 F.3d 1157, 1161 (9th Cir. 2008) (*en banc*). The Court concluded that while immunity would attach to the statements made by subscribers in the "Additional Comments" sections of their profiles, and to any generic searches conducted by users, regardless of the basis for those searches, it should *not* attach to the formatted questions and answers about sex, sexual orientation, and children in the household, and preferences as to those criteria. *Id.* at 1166. As to the statutory and constitutional questions, the court concluded that "[w]e need not decide whether any of Roommate's questions actually violate the Fair Housing Act or California law, or whether they are protected by the First Amendment or other constitutional guarantees." *Id.* at 1164. The court expressly left for this Court the determination whether the FHA applies to postings for roommates, and whether such a construction of the Act would pass constitutional muster.

III.

ARGUMENT

A. The CDA Immunizes Defendant from Liability for "Additional Comments," Unprompted Searches, and Unauthorized Uses.

The vast bulk of plaintiffs' amended complaint is a collection of unprompted statements made by users of Roommate's services in the "Additional Comments" section of their profiles.[2] These are precisely the comments that the Ninth Circuit held were within the grant of immunity provided by the CDA, as are any unprompted searches conducted by users, whatever the terms used. *See id.* at 1175. To the extent that plaintiffs' complaint is based on such comments, the claims are barred.

Plaintiffs also cannot salvage their case by redefining defendant's business as a clearinghouse for commercial rentals. Plaintiffs allege that the defendant each month "enters into contracts with hundreds of thousands of landlords and sub-leasers to post rental advertisements." First Amended Complaint ("FAC") at ¶ 10. This is untrue. The questions that gather information for user profiles and preferences make crystal clear that the site matches "potential roommates." No options, and no evidence offered by plaintiffs, suggest that the site offers vacant houses or apartments for sale or rental. (SS ¶ 12.) The website's name, banner ("The Web's Most Popular Roommate Matching Service"), and self-description on its home page inform users that the website does one thing and one thing only: "Roommates.com is a roommate finder and roommate search service." (SS ¶ 13.) The website's terms of use, which must be agreed to by all users, specifically state that defendant's services are devoted to locating individual shared housing, by "provid[ing] users with roommate resources." (SS ¶ 14.)

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[2] Indeed, every single statement included in para. 15-32 of the FAC is drawn from the "Additional Comments." (SS ¶¶ 11.)

Plaintiffs have produced no evidence that roommates.com is a commercial rental service for landlords. Any such evidence would be irrelevant in any event. Defendant cannot be held liable for the misuse of its site for unlawful purposes, any more than the dating site in *Carafano v. Metrosplash.com*, 339 F.3d 1119 (9th Cir. 2003), was liable for the defamatory comments made by the "anonymous dastard" whose use of the site was "contrary to the website's express policies." *Roommates.com*, 521 F.3d at 1171. And, any statement in a profile suggesting that the person posting an available residence is a landlord, or that the residence is a vacant house or apartment (and not a roommate situation) would necessarily appear in the "Additional Comments" section, and is unprompted -- indeed, such a statement conflicts with the site's formatted questions. (SS ¶ 17.) No liability can be based on such unprompted statements. *Roommates.com*, 521 F.3d at 1166.

The issue here is *not* whether an Internet service that require commercial landlords to advertise for tenants according to gender or family status might be subject to liability under the FHA; plainly it would be, given that only discriminatory animus would explain such a practice. Rather, the issue presented is whether the FHA governs a site that operates solely for "provid[ing] users with roommate resources" for shared living accommodations. Before that question can even be reached, however, plaintiffs must first establish that they have standing to raise it, a burden they have failed to meet.

B. Plaintiffs Lack Standing Under the Fair Housing Act

In *Havens Realty v. Coleman*, 455 U.S. 363 (1982), the Supreme Court extended standing under the FHA beyond individuals to organizations fighting actual discrimination in housing. Organizations have standing if the owner's steering practices "perceptively impaired the organization's ability to provide housing counseling and referral services" and drained its resources. *Id.* at 379. The Supreme Court strongly cautioned, however, that an organization must show "concrete and

demonstrable injury to [its] activities," not "simply a setback to the organization's abstract social interests," to establish standing. *Id.*

Subsequently, the D.C. Circuit in *Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990), and the Third Circuit in *Fair Housing Council v. Montgomery Newspapers*, 141 F.3d 71 (3rd Cir. 1998), extended standing to organizations challenging advertisers if the organizations could meet the same test applicable to individuals. "[T]he organization must show actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." *Spann*, 899 F.2d at 27.

In their complaint, plaintiffs allege that the postings on roommates.com caused them to devote "significant efforts, expenses, and resources in responding to defendant's discriminatory statements and investigating the discriminatory practices alleged herein." (FAC ¶ 49.) Although such allegations may well be enough to afford plaintiffs standing at the motion to dismiss stage, they are insufficient at the summary judgment stage. In order to "defeat the summary judgment motion based on the issue of standing, the [organization] was required to submit 'affidavits or other evidence showing through specific facts . . . that . . . it [was] 'directly' affected [by the alleged discrimination].'" *Montgomery*, 141 F.3d at 76 (citations omitted). While the court recognized that the plaintiff's allegations "were sufficient to withstand a motion to dismiss," the court held that "something more than these naked allegations was required at the summary judgment stage," and noted that "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* (citations omitted).

Plaintiffs have failed to meet this burden. They have not submitted one piece of concrete evidence to show how any of their resources have been diverted because of Roommate's formatted questions about gender, sexual orientation, or presence of children in the household. In *Montgomery*, the plaintiff-organization claimed that it

had standing because it was forced to divert resources to "(1) an educational campaign designed to counteract the discriminatory effect of the advertisements; (2) an investigation designed to determine the existence and extent of on-going discrimination in advertising; and (3) litigation." *Id.* The court rejected the first argument because "the only evidence relating to implementation of an educational effort was the organization's allegation that, at some future time, it would be required to spend almost $100,000 in newspaper advertising and over $300,000 in seminars and mailings to reach consumers to counter the advertisements' discriminatory message," which it found to be insufficient. *Id* at 77; *see also Louisiana ACORN Fair Housing v. Leblanc*, 211 F.3d 298 (5th Cir. 2000) (finding no organizational standing because plaintiff failed to show how defendant's conduct caused "a specific drain on its resources"); *Arkansas ACORN Fair Housing, Inc. v. Greystone Development, Ltd. Co.*, 160 F.3d 433 (8th Cir. 1988) (same).

The *Montgomery* court rejected the second argument because the investigation at issue consisted of no more than "having its staff members review classified advertisements placed in Montgomery and other suburban Philadelphia newspapers on an ongoing basis for evidence of discrimination," which was in fact part of the "normal day-to-day operations" of the organization, and not caused by the defendant's conduct. 141 F.3d at 78. Finally, as to litigation costs, the *Montgomery* court held that litigation costs alone do not confer standing on an organization: "Were the rule otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation." *Spann*, 899 F.2d at 219. The Ninth Circuit adopted the same rule in *Walker v. City of Lakewood*, 272 F.3d 1114 (9th Cir. 2001).

Plaintiffs in this case have produced even less evidence than in *Montgomery*. They have offered no evidence of diversion of resources to education targeted at the wrongdoing alleged against defendant -- asking formatted questions about gender, sexual orientation, and the presence of children. Rather, they seek damages for the standard efforts at community outreach and professional conferences that they have

hosted or attended for years prior to the creation of roommates.com. When they have discussed this dispute or the roommates.com Site, it has been either in a very general context, such as "advertising" or "Internet advertising" for housing, or simply a sharing of information with other housing advocates about this litigation. No effort was made to address or "mitigate" alleged harm from roommate advertising or the roommates.com site. (SS ¶ 19.) Plaintiffs seek damages for their "normal day-to-day operations," and that does not confer standing.

Further, plaintiffs have provided no evidence that any particular individual or group of individuals was denied access to housing or wrongly discriminated against due to defendant's questions. (SS ¶ 20.) This is a case without any cognizable injury; it arises solely from plaintiffs' distaste for defendant's website. As in *Montgomery*, plaintiffs simply do not have standing to pursue this litigation.

C. The FHA Does Not Apply to Postings for Roommates

The words and history of the FHA, the regulations and memoranda issued by HUD, the exemptions specifically provided in other federal acts to allow same sex-roommates, and the opinions of every single court and agency to address the question clearly establish that the FHA applies to commercial sales and rentals of property as well as advertisements for such property -- not to roommate situations[3], or to postings

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[3] Although courts have applied the FHA to commercial and charitable organizations operating group homes, such holdings have been limited to situations where an array of residents are housed in a group situation. *See, e.g., Turning Point v. City of Caldwell*, 74 F.3d 941 (9th Cir. 1996) (homeless shelter liable for FHA violation for failing to make reasonable accommodations); *United States v. Commonwealth of Puerto Rico*, 764 F. Supp. 220 (D. Puerto Rico 1974) (injunction appropriate to see if local ordinance requiring permit for a nursing home violated the FHA); *United States v. Hughes Memorial Home*, 396 F. Supp. 548 (D. Va. 1975) (FHA applies to children's home as a whole). None of these cases involved the assignment of individuals to share a room. The individual selection of roommates typically involves highly personal choices because of the intimate nature of the contact, including sharing bathrooms, kitchens, and sometimes bedrooms.

by individuals aimed at finding suitable roommates. The FHA "stops at the front door," *Senior Civil Liberties Ass'n, Inc. v. Kemp*, 965 F.2d 1030, 1036 (11th Cir. 1992). It does not dictate that men must share apartments with women, or that single people must live with those who have children, or that gays and straights cannot prefer those with similar orientations as roommates.

1. The Legislative History Establishes that the FHA was Aimed at Commercial Sales and Rentals.

The FHA prohibits any "statement . . . with respect to the sale or rental of a dwelling that indicates . . . an intention to make [a] preference, limitation, or discrimination" on the basis of a protected category, including race, religion, or sex.[4] 42 U.S.C. § 3604(c). The prohibition on discriminatory advertising effectuates the prohibition on actual discrimination in the Act.[5] Nothing could be clearer than that Congress, in enacting the FHA, aimed to prohibit discrimination in the commercial sale and rental of houses and apartments by brokers, landlords, and owners -- not to tell individuals with whom they must share their homes. Its goal was to expand the ability of African Americans to buy and rent homes, not to control roommate choices.

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[4] There is no allegation in this case, and certainly no evidence, that either the questions or the preference prompts which the Ninth Circuit held to be outside the immunity of the CDA include any reference to race or religion.

[5] The only difference between the substantive prohibitions of the Act and the advertising provisions relates to the "Mrs. Murphy" exception, discussed *infra*, which exempts landlords in owner-occupied buildings containing four or fewer units from the substantive -- but not the advertising -- prohibitions of the Act. There is no basis, in the language of the Act, the legislative history, or any judicial opinion or administrative regulation, for any argument that, except with respect to the Mrs. Murphy situation, Congress intended the advertising prohibitions to be broader than the actual discrimination provisions; any such interpretation would, by definition, involve suppression of speech as to lawful activity, in violation of the First Amendment.

"It is undeniable that the fair housing provisions were aimed toward *actual sales and rentals* of real estate." *Mayers v. Ridley*, 465 F.2d 630, 652 (D.C. Cir. 1972) (*en banc*) (emphasis added). As Senator Walter F. Mondale, the prime sponsor of the Act explained, "The bill permits an owner to do everything that he could do anyhow with his property -- insist upon the highest price, give it to his brother or to his wife, sell it to his best friend, do everything he could every do with property, except *refuse to sell it* to a person based solely on the basis of color or religion." 2 Statutory History of the United States: Civil Rights (Bernard Schwartz ed., 1970), at 1751 ("Schwartz") (emphasis added). The explanatory memorandum from the Department of Justice was to the same effect: "What is prohibited is the use of *sales* and *rental* services and facilities, *i.e.*, the use of a professional real estate dealer or other person in the business of selling or renting dwellings to help in accomplishing the individual's discriminatory purpose." *Id.* at 1692 (original emphasis). So was the statement by co-sponsor Emanuel Cellars in the House of Representatives: "What is needed to end housing discrimination is a universal Federal law with uniform coverage so there will be a single set of rules everywhere for everyone -- *buyers, sellers, and real estate brokers*." *Id.* at 1778 (emphasis added).

Indeed, Congress excluded from the Act's prohibitions the sale or rental of owner-occupied dwellings of less than four units, the so-called "Mrs. Murphy" exception which, while not applicable to advertising, clearly evinced Congress' intent not to regulate even commercial relationships involving separate dwellings where doing so might infringe on privacy interests. As Senator Hubert Humphrey explained, the Mrs. Murphy exemption from the FHA was based on a similar exemption from Title II of the Civil Rights Act of 1964, which prohibited discrimination in public accommodations. Senator Humphrey described Title II as "carefully drafted and moderate in nature. There is no desire to regulate truly personal or private relationships." Schwartz, *supra* at 1194. Nowhere in the Congressional

debate is there so much as a suggestion that either the prohibitions of the FHA or its advertising limitations were intended to apply to roommate selection.

Moreover, four years later, when Congress passed Title IX of the Education Act prohibiting sex discrimination by any educational institution that receives federal funds, it explicitly exempted from the discrimination prohibited by *that* Act separate housing on the basis of sex. *See* 20 U.S.C. §1686 ("[N]othing contained herein shall be construed to prohibit any educational institution receiving funds under this Act . . . from maintaining separate living facilities for the different sexes."); 45 C.F.R. § 86.32 (educational institutions "may provide separate housing on the basis of sex"). But there is no mention in Title IX of an exemption from the FHA, and no suggestion in the legislative history that such an exemption was necessary for single-sex dorms or sex-based roommate assignments.

Indeed, HUD itself, in the regulations it published applying the FHA, made clear that not only were universities entitled to assign roommates by sex; they were also entitled to maintain entire dormitories limited to one sex, and to advertise for them. *See Wilson v. Glenwood Intermountain Properties*, 876 F. Supp. 1231, 1243 (D. Utah 1995) (citing 45 C.F.R. § 86.32(c)(2)), *vacated on other grounds*, 98 F.3d 590 (10th Cir. 1996) (holding that advertisements for single-sex on-campus and off-campus housing for students did not violate the FHA). Under plaintiffs' theory, such an interpretation would be beyond the authority of HUD, for it would amount to selectively rewriting the Act. *See Wilcox v. Ives*, 676 F. Supp. 355, 357 (D. Maine 1987) (rejecting agency regulation that is inconsistent with statute). In fact, it is the common practice of colleges and universities to solicit information and assign roommates based on information about gender and children, and in some cases, sexual identification as well. Had Congress even thought that the FHA applied to shared living situations, it would have mentioned it specifically in the exemption it granted for single-sex dorms and dorm rooms under Title IX. It did not, for the very simple reason that the FHA was inapplicable to such situations.

2. HUD Has Construed the FHA as Not Reaching Shared Living Arrangements.

After the passage of the FHA, HUD issued regulations aimed, among other things, at clarifying the kinds of advertising the Act prohibited and the type of complaints HUD would pursue. The applicable regulation, 24 C.F.R. 109.20, specifically stated that sex-based advertisements for shared living quarters were *not* prohibited by the Act:

> The following words, phrases, symbols, and forms typify those most often used in residential real estate advertising to convey either overt or tacit discriminatory preferences or limitations. In considering a complaint under the Fair Housing Act, the Department will normally consider the use of these and comparable words, phrases, symbols, and forms to indicate a possible violation of the act and to establish a need for further proceedings on the complaint, if it is apparent from the context of the usage that discrimination within the meaning of the act is likely to result.
>
> (a) Words descriptive of dwelling, landlord, and tenants. White private home, Colored home, Jewish home, Hispanic residence, adult building.
>
> (b) Words indicative of race, color, religion, sex, handicap, familial status, or national origin . . .
>
> > 5) Sex -- the exclusive use of words in advertisements, including those involving the rental of separate units in a single or multi-family dwelling, stating or tending to imply that the housing being advertised is available to persons of only one sex and not the other, *except where the sharing of living areas is involved.* Nothing in this part restricts advertisements of dwellings used exclusively for dormitory facilities by educational institutions.

24 C.F.R. 109.20 (emphasis added).[6]

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[6] While part 109 was officially withdrawn from the Code of Federal Regulations by directive no. FR-4029-F-01, effective May 1, 1996, it continues to represent the positions of HUD on advertising issues, except as they were superseded by Roberta (footnote continued)

On January 9, 1995, Assistant Secretary for Fair Housing and Equal Opportunity Roberta Achtenberg issued a Memorandum intended to clarify the HUD regulation quoted above. In particular, she addressed the issue of whose responsibility it was -- the person placing the ad or the publisher of it -- to ensure that sex-specific advertisements for roommates were in fact seeking individuals for shared living. Achtenberg instructed HUD officials *not* to accept complaints against newspapers for ads seeking "female roommates;" she advised that the person placing the ad, not the newspaper that publishes it, is responsible for assuring that the advertisement was for shared living:

> For example, Intake staff should not accept a complaint against a newspaper for running an advertisement which includes the phrase female roommate wanted because the advertisement does not indicate whether the requirements for the shared living exception have been met. Publishers can rely on the representations of the individual placing the ad that shared living arrangements apply to the property in question.[7]

HUD's recognition that the prohibitions of the FHA do not apply to shared living, not to mention its directive that the individual placing the ad -- not the publisher of it -- is responsible for ensuring that it is for shared living, should be controlling here. No amendments by Congress or new regulations by HUD have been enacted since 1995 that alter that understanding.[8] The fact that the Achtenberg Memorandum is specifically addressed to sex-based roommate ads, rather than to all

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Achtenberg's memo, discussed *infra*. *See United States v. Old Kent Financial Corp.*, 2004 WL 115779 at *1 (E.D. Mich. May 19, 2004).

[7] Declaration of Timothy L. Alger, ¶ 10, Ex. H (Memorandum by Roberta Achtenberg, dated January 9, 1995, available at: www.hud.gov/offices/fheo/disabilities/sect804achtenberg.pdf). Defendant requests that the Court, if appropriate, take judicial notice of the Memorandum. *Fed. R. Evid.* 201.

[8] Plaintiffs acknowledge that gender-based roommate selection and advertising are not unlawful.

of the criteria addressed by the Act, in no way undercuts its force. The three questions and search prompts at issue in this case are gender, sexual orientation, and the presence of children. Sex is addressed specifically by the Achtenberg Memorandum; sexual orientation is not addressed at all by the FHA; and the FHA's provisions against discrimination against individuals with children, as the Eleventh Circuit has held, "stop at the front door." *See Senior Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030 (11th Cir. 1992), discussed *infra*.

3. No Court or Agency that Has Considered the Question Has Applied the FHA to Shared Living Arrangements or Postings for Such Arrangements.

The position taken by HUD is precisely the same as the position taken by every court to consider the application of the FHA to roommate assignment or shared-living situations. In *Wilson v. Glenwood Intermountain Properties*, *supra*, the court faced the questions whether Brigham Young University violated the FHA when it segregated students by sex in both on- and off-campus housing, and whether landlords providing this off-campus housing violated the Act by advertising this housing as male or female only. The court recognized that Title IX expressly allows a university to segregate students by gender in housing and advertise such segregation. 876 F. Supp. at 1243 (citing 45 C.F.R. § 86.32(a)-(b) (1993) (educational institutions 'may provide separate housing on the basis of sex' provided that they do not apply 'different rules or regulations' related to that housing); § 86.32(c)(2) ("sex-segregated housing may be provided 'through solicitation, listing, approval of housing, or otherwise'")). For a court to apply the FHA to universities in this context, it "would be forced to disagree with the interpretation given to both the Fair Housing Act and Title IX by the very same federal agencies who are charged with enforcing those statutes" -- interpretations that the court held were entitled to "substantial deference." *Id.* at 1244-45 (noting that both U.S. Department of Justice

and U.S. Department of Education expressly sanctioned segregation of college students by gender).

The Eleventh Circuit reached a similar conclusion as to the reach of the FHA in protecting families with children against discrimination. In *Senior Civil Liberties Ass'n, supra*, persons living in a condominium complex that forbade children under a certain age challenged the application of the FHA to their complex, on the ground that the FHA violated their First Amendment right of intimate association. The court rejected their challenge precisely because it concluded that the Act did *not* control who lived within particular units, but only whether individuals with children could be excluded from purchasing their own units. "If the Act were trying to force plaintiffs to take children into their home, this argument might have some merit. *But the Act violates no privacy rights because it stops at the [plaintiffs'] front door*." 965 F.2d at 1036 (emphasis added).[9]

The Washington State Attorney General, faced with questions as to the scope of a state law version of the FHA, reached the same conclusion. The Attorney General concluded that it is lawful for "a person to discriminate on the basis of sex, age or religion in selecting a roommate with whom to share living quarters, or for a person to specify in an advertisement for a roommate that the roommate must be of a particular sex, age or religion, or for a newspaper to publish an advertisement for a roommate when the advertisement contains such a specification." 1976 Op. Wash. A.G. 17, at 1, 1976 WL 168501. The Opinion found that "one of the societal values which is deserving of recognition , in our view, is the basic freedom to control one's life by choosing the sex of person with whom one lives." *Id.* at 4-5. Notably, there is nothing in the Opinion suggesting that, without regard to the possible interpretation

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[9] *See also Texas v. Lawrence*, 539 U.S. 558, 562 (2003) ("Liberty protects the person from unwarranted government intrusion into a dwelling or other private places. In our tradition the State is not omnipresent in the home.").

of state law, such postings could violate federal law. Indeed, counsel for Roommate has been unable to find a single published case in which any court, state or federal, has concluded that postings for shared living violate the FHA, or the many state equivalents.

D. Plaintiffs' Interpretation of the FHA Would Raise Serious Constitutional Questions and Violate Fundamental Constitutional Rights

The "canon of constitutional avoidance . . . requires a statute to be construed so as to avoid serious doubts as to the constitutionality of an alternate construction." *Sosa v. DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006) (citing *INS v. St. Cyr.*, 533 U.S. 289, 299-300 (2001)) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems.'"); *U.S. v. Booker*, 543 U.S. 220, 286 (2005) (same). This principle of constitutional avoidance, "which 'has for so long been applied by this Court that it is beyond debate,' . . . is intended to show respect for Congress by presuming it 'legislates in the light of constitutional limitations.'" *Id.* (citations omitted).

In this case, as defendant has demonstrated, the FHA clearly does not apply to postings for roommates. However, even assuming *arguendo* that a contrary interpretation is possible, it is *at least* equally plausible that the FHA is inapplicable. And since barring private individuals from obtaining information necessary to guide their choice of roommates raises serious constitutional concerns, this Court should, under the doctrine of constitutional avoidance, adopt the construction set forth by defendant that does not raise such questions. Plaintiffs' construction of the statute would prevent defendant and its subscribers from identifying roommates based on certain natural preferences (*e.g.*, same gender, sexual orientation, or presence of children), thereby infringing the rights to intimate association and privacy, as well as freedom of expression of defendant's members. This breach of fundamental rights is unwarranted and should be avoided.

1. The Associational Rights At Stake Warrant Heightened Protection.

The Supreme Court has recognized the right of "intimate association" as a protected liberty interest under the First and Fourteenth Amendments. *See N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460-61 (1958); *Britt v. Superior Court*, 20 Cal. 3d 844, 852053 (1978); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). As the Supreme Court recognized in *Roberts*, "[t]he right of private association protects the choice of individuals and organizations 'to enter into and maintain certain intimate human relationships . . . against undue intrusion by the State," and "reflects the realization that individuals draw much of their emotional enrichment from close ties with others." *Id.* at 617-19. "Protecting these relationships form unwarranted state interference . . . safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.* As a corollary, the right of association "plainly presupposes a freedom *not* to associate." *Roberts*, 468 U.S. at 623 (citation omitted; emphasis added).

While the Supreme Court and lower courts have recognized that relationships deserving the highest level of constitutional protection relate to the "creation and sustenance of family," including marriage, the begetting, raising and educating of children, and cohabitation with relatives, *see id.*, the right to intimate association has not been restricted to the family context. *See Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) ("We have not held that constitutional protection is restricted to relationships among family members."). Instead of adopting a categorical approach, the Supreme Court conducts a "careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Roberts*, 468 U.S. at 620; *see also Louisiana Debating and Literary Ass'n v. City of New Orleans*, 42 F.3d 1483 (5th Cir. 1995) (*citing Rotary Club*, 481 U.S. at 546).

As part of that inquiry, courts have examined whether the relationship at issue involves "deep attachments and commitments to necessarily few other individuals

with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Roberts*, 468 U.S. at 620. Courts have considered "such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* In contrast, relationships which lack such attributes, "such as those found in the impersonal hierarchy of a large corporation or other business organization" are "'remote' from the privacy concerns giving rise to constitutional protection. . . ." *Pacific-Union Club v. Superior Court*, 232 Cal. App. 3d 60, 72 (1991).

Between these two poles "lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State." *Roberts*, 468 U.S. at 620. In *Roberts*[10] and *Rotary Club*[11], the Supreme Court denied associational protection to groups that lacked the requisite smallness, selectivity, focus and exclusion to warrant constitutional protection. In contrast, denial of membership access, even on discriminatory grounds, has been upheld in

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[10] With respect to the Jaycees in *Roberts*, the local chapters were large (400 members) and unselective since "new members [were] routinely recruited and admitted with no inquiry into their backgrounds." *Roberts*, 486 U.S. at 621. Accordingly, since "much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship," *id.*, "the Jaycees chapters lack[ed] the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women." *Id.*

[11] The Rotary clubs were deemed not to be intimate associations because the sizes varied from 20 to over 900, with no upper limit on membership, the clubs had "inclusive, not exclusive" membership policies, and clubs were instructed to "keep a flow of [membership] prospects coming" to achieve "a true cross section of the business and professional life of the community." *Rotary Club*, 481 U.S. at 546. In addition, many of the clubs' "central activities [were] carried on in the presence of strangers . . . ." *Id.* at 546-547. In short, the Court found that "Rotary Clubs, rather than carrying on their activities in an atmosphere of privacy, seek to keep their 'windows and doors open to the whole world.'" *Id.* at 547.

cases where organizations are tight-knit, selective, exclusionary and focused on a particular social purpose. For instance, in, *Louisiana Debating*, the Fifth Circuit rejected the application of a New Orleans ordinance, which prohibited discrimination in places of public accommodation, to four social clubs in New Orleans because the clubs had a "purely social purpose" and selected members based on "character, relationships and acquaintances, congeniality and compatibility." 42 F.3d at 1496. The court noted that the clubs' admission policies were highly restrictive, non-members were excluded from the clubs' facilities, and each club had upper limits on membership. *See id.* Accordingly, the court found that the clubs were entitled to the highest level of constitutional protection.[12] Likewise, in *Pacific-Union Club*, the court upheld the associational rights of a private club in rejecting the Franchise Tax Board's efforts to obtain its membership lists in order to regulate compliance with a ban on tax deductions for business expenses at clubs that engage in discriminatory membership practices. 232 Cal. App. 3d at 72. In upholding the club's liberty interest, the court noted that in contrast to *Roberts* and *Rotary Club*, the club was "much farther toward the intimate pole of the associational spectrum," due to its smaller membership, organizational structure, geographic focus, highly restrictive membership practices and focus on congeniality. *Id.* at 73. Similarly, in *Hart v. Cult Awareness Network*, 13 Cal. App. 4th 777 (1993), the court upheld the right of intimate association of a "'well-defined subgroup . . . whose membership is highly restricted and selective, based on shared opinions, thoughts and concerns with respect to 'destructive cults.'" *Id.* at 788-89 (citations omitted).

While plaintiffs might attempt to focus the Court on roommate.com's traffic or number of active listings to place defendant within the *Roberts/Rotary Club* line of

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[12] *Cf. Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (holding that applying New Jersey's public accommodations law to require Boy Scouts to admit homosexual plaintiff violated Boy Scouts' First Amendment right of expressive association).

cases, the relevant association is not the number of visiting eyeballs or website postings, but the nature of the association involved in the challenged practice. Here, the relevant "association" is between potential roommates posting and viewing such notices. Defendant is entitled to assert this third-party interest on behalf of its users. *See U.S. v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1096 (9th Cir. 2008) (where First Amendment privacy interests were at stake, "[a]n association has standing to sue on behalf of its members when they would otherwise have independent standing to sue, the interests sought to be protected are germane to the organization's purpose, and the claim asserted does not require the participation of individual members in the lawsuit"); *see also Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835 (9th Cir. 2001). Since interpreting the FHA to preclude roommates.com from requiring or transmitting such information would directly burden those seeking safe and compatible shared living arrangements, these associational interests are entitled to heightened scrutiny.

Indeed, the associational interests at stake here have many of the attributes of a familial relationship. Individuals who obtain roommates through the service will share kitchen and living spaces, and, in some circumstances, bathrooms or bedrooms. Much like families, their lives will become closely intertwined, as they share meals and expenses, work out compromises and resolve interpersonal conflicts, entertain guests, overhear conversations, and see each other at their best and worst. In short, these quasi-familial relationships have the requisite selectivity, smallness and seclusion from others to fall within the heightened zone of constitutional protection.

As part of their search process, individuals seeking shared living arrangements are understandably concerned about both compatibility and personal security; it is not unreasonable, for instance, for women to want to room with other women out of concern for their physical safety, to reduce the likelihood of unwanted sexual advances, to enhance their ability to move freely -- clad or unclad -- throughout their living space, and to form bonds enhanced by common interests and shared attributes.

Likewise, singles who are not accustomed to the demands of children may reasonably wish to live with other singles or select certain age categories of children to accommodate their lifestyles. And single mothers or fathers may wish to obtain the support systems associated with rooming with other single parents. Defendant, in making information about such personal characteristics available to its users, facilitates associational ties that involve "'distinctively personal aspect of one's life.'" *Hart*, 13 Cal. App. 4th at 788 (quoting *Rotary Club*, 481 U.S. at 545). Plaintiffs' assumption that the communication of such information necessarily reveals an intent to "discriminate" misapprehends the lawful and practical reasons, entirely unrelated to any prohibited bias or animus, that individuals seeking shared living arrangements may have in knowing the characteristics of potential roommates.[13] In short, on the "broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State . . .,' the relationship . . ., objectively assessed, primarily involves the intimate personal concerns and activities deserving of a high level of constitutional protection." *Hart*, 13 Cal. App. 4th at 789.

2. Plaintiffs' Proposed Interpretation Cannot Satisfy Strict Scrutiny.

Because defendant and its members have associational rights protected by the highest level of constitutional scrutiny, plaintiff must demonstrate that its attempted regulation of postings for shared living arrangements satisfies strict scrutiny. Accordingly, plaintiff must show that preventing roommates.com or its users from posting or reviewing roommate solicitations identified according to gender, sexual orientation and the presence of children is justified by a compelling state interest and

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[13] Indeed, defendant's members often undergo a rigorous process before entering into a shared living arrangement, including e-mail communications, phone conversation, and inspection of the residence. (SS ¶ 18.) Only when both parties are satisfied that the rooming relationship is viable does the shared arrangement occur.

is the least intrusive method to satisfy that interest. *See Sheldon v. Tucker*, 364 U.S. 479, 488 (1980); *N.A.A.C.P. v. Alabama*, 357 U.S. at 463; *Brock v. Local 375, Plumbers Intern. Union of America, AFL-CIO*, 860 F.2d 346, 350 (9th Cir. 1988).[14] "The state bears a 'particularly heavy' burden of establishing a compelling state interest . . . in this highly sensitive constitutional area . . ., '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Pacific-Union Club,* 232 Cal. App. 3d at 78 (quoting *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (citations omitted)). Moreover, "[e]ven if such a compelling interest is present, it 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* (*quoting Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

In this case, there is certainly a compelling interest in preventing discrimination in the sale and rental of dwellings, and in ensuring that those who have been traditional targets of discrimination have an opportunity to secure housing. But there is absolutely no evidence that this interest is being negatively impacted by respecting individual freedom of association to choose roommates. Plaintiffs' own examples belie the notion of any systemic preferences for or against any vulnerable group and demonstrate as many instances of individuals seeking homosexual roommates as heterosexual ones, and women as men. (FAC ¶¶ 15-32.) In short, this case does not implicate the civil rights concerns addressed by passage of the FHA.

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[14] Even under intermediate scrutiny, plaintiffs' action fails because preventing the elicitation of information necessary to ensure safe and compatible living arrangements does not serve any substantial governmental interest. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm.*, 447 U.S. 557, 566 (1980). The only plausible justification -- prevention of discrimination -- is not implicated here since the preference for individuals with similar characteristics produces no pattern of exclusion of any protected group. Moreover, plaintiffs' interpretation would clearly suppress free expression since plaintiff seeks to ban the solicitation and conveyance of information at the heart of First Amendment expression.

The relief sought by plaintiff would require individuals seeking shared living arrangements either to entirely suppress their desire for roommates with similar characteristics (and take their chances, for instance, in mixed-gender roommate situations) or, more likely, to go to lengthy and cumbersome means to ascertain the characteristics of potential roommates (*e.g.*, through numerous face-to-face meetings). As the Supreme Court has recognized, "associational rights 'are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference . . . .'" *Lyng v. International Union, etc.*, 485 U.S. 360, 367 n.5 (1988) (*quoting Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960)). However laudable plaintiffs' abstract goals, it is simply not government's role to regulate private rooming choices. *See Gouvela v. Sears*, 2006 WL 2882826 at *3 (D. Or. Oct. 6, 2006) ("Whether called a right to intimate association . . . or a right to privacy . . . , the point is similar: 'choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.'") (citations omitted).[15]

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[15] It follows, of course, that if the underlying activity -- preferring to live with individuals of a similar sex, sexual orientation, or family composition -- is lawful, then both the individual subscribers and defendant have a right to advertise such preferences to effectuate their lawful intent. There is no basis to argue that while particular preferences in roommate selection are lawful, advertisements designed to effectuate such preferences are not. *See, e.g., Housing Opportunities Made Equal, Inc. v. Cincinnatti Enquirer, Inc.*, 943 F.2d 644, 651-53 (6th Cir. 1991). The ban on sex-specific employment advertising at issue is *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Rights*, 413 U.S. 376 (1973), turned on the illegality of engaging in sex discrimination in employment.

3. Plaintiffs' Proposed Interpretation Violates the Right to Receive and Convey Information.

Plaintiffs' construction of the statute also would violate the right to receive and convey information and solicit responses -- bedrock First Amendment values -- by precluding individuals from obtaining or sharing information related to central aspects of their personhood. *See Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("It is now well established that the Constitution protects the right to receive information and ideas."); *see id.* at 146-147 ("Freedom to distribute information to every citizen . . . is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved."); *Allentown Mack Sales and Service, Inc. v. N.L.R.B.*, 522 U.S. 359, 386-387 (1998) (Rehnquist, J., concurring in part, dissenting in part) ("Our decisions have concluded that First Amendment protection extends equally to the right to receive information . . . , and to the right to solicit information or responses.") (*citing Edenfield v. Fane*, 507 U.S. 761, 765-766 (1993); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976)); *Conant v. Walters*, 209 F.3d 629, 643 (9th Cir. 2002) ("It is well established that the right to hear -- the right to receive information -- is no less protected by the First Amendment than the right to speak . . . Indeed, the right to hear and the right to speak are flip sides of the same coin.").

While these protections apply to purely commercial speech, *see Edenfield*, 567 U.S. at 766-767, they apply with even greater force to speech that is tied to fundamental rights of privacy and personhood. Indeed, even information that is deemed to lack "social worth" is entitled to protection. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (the "right to receive information and ideas regardless of their social worth, is fundamental to our free society."). Accordingly, no matter how plaintiffs or the Court view individuals' desires to live with persons with shared characteristics, and to obtain the information necessary to effectuate such preferences,

the questions regarding gender, sexual orientation and children, designed to permit informed decision-making about roommate selection, fall squarely within the First Amendment.

## CONCLUSION

For the forgoing reasons, defendant Roommate.com, LLC respectfully requests that the Court grant summary judgment in its favor on the first claim for relief, dismiss the first, second, third, fourth, and fifth claims for relief pursuant to 28 U.S.C. § 1367(c), and dismiss the action in its entirety.

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